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No. 90-354

In the Supreme Court of the United States

OCTOBER TERM, 1990

SARAH ELIZABETH FREY, ET AL., PETITIONERS

v.

WILLIAM K. REILLY, Administrator,
Environmental Protection Agency

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 113(h)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 9613(h)(4), precludes judicial review of petitioners' challenge to a proposed remedial action under Sections 104 and 106 of CERCLA, 42 U.S.C. 9604 and 9606.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-17a) is reported at 900 F.2d 1091. The opinion of the district court (Pet. App. 18a-31a) is reported at 28 Env't Rep. Cas. (BNA) 1655.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1990. A petition for rehearing was denied, as amended, on May 31, 1990. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on August 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. 9601 *et seq.*, provides detailed procedures for cleaning up releases or threatened releases of hazardous substances. Under Section 104(a)(1) of CERCLA, 42 U.S.C. 9604(a)(1), for example, the Environmental Protection Agency may take so-called "removal" or "remedial" action

> * * * [w]henever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare * * *.

If the EPA determines that the facility's owner or another responsible party will take such action promptly and properly, it may "allow such person to carry out the action." *Ibid.*[1] Before either the EPA or a private individual takes remedial action, the EPA (or in appropriate cases, an interested party under the EPA's supervision) studies the site, exam-

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[1] A removal action typically involves the EPA's first steps at a hazardous waste site—for example, fencing, excavating, and disposing of the most contaminated soils—in order to stabilize the threat. See 42 U.S.C. 9601(23). A remedial action, on the other hand, typically involves the EPA's steps to ensure a permanent clean-up of the site—for example, groundwater pumping and treating, and excavating and disposing of all contaminated soils—to eliminate the threat. See 42 U.S.C. 9601(24); 40 C.F.R. 300.6. This case involves a remedial action.

ines alternative remedies, and ultimately the EPA selects a preferred clean-up remedy. See 42 U.S.C. 9605; 40 C.F.R. Pt. 300 (1983) (National Oil and Hazardous Substances Pollution Contingency Plan (NCP)).[2]

As amended by SARA, Pub. L. No. 99-499, 100 Stat. 1613, Section 310 of CERCLA, 42 U.S.C. 9659 —the citizen suit provision—enables any person to commence a civil action on his own behalf against any person or the government for violating the statute, 42 U.S.C. 9659(a)(1), and specifically provides for suits against the EPA "where there is alleged a failure * * * to perform any act or duty under [CERCLA] * * * which is not discretionary * * *" 42 U.S.C. 9659(a)(2). Judicial review of citizen-suit challenges, however, is circumscribed by Section 113(h) of CERCLA, 42 U.S.C. 9613(h).

Section 113(h), which governs "timing of review," provides in pertinent part:

> No Federal court shall have jurisdiction under Federal law other than section 1332 of title 28 * * * or under State law which is applicable or relevant and appropriate under section 9621 * * * (relating to clean-up standards) to review any challenges to removal or remedial action selected under section 9604 * * *, or to review any order issued under section 9606(a) * * *, in any action except one of the following:
>
> (1) An action under section 9607 * * *.
>
> (2) An action to enforce an order issued under section 9606(a) * * *.

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[2] The current NCP—applicable to remedies undertaken after 1985—appears at 55 Fed. Reg. 8865 (1990) (to be codified at 40 C.F.R. Pt. 300)).

> (3) An action for reimbursement under section 9606(b)(2) * * *.
>
> (4) An action under section 9659 * * * alleging that the removal or remedial action *taken* under section 9604 * * * or *secured* under section 9606 * * * was in violation of any requirement of this [Act] * * *.
>
> (5) An action under section 9606 * * * in which the United States has moved to compel a remedial action.

42 U.S.C. 9613(h) (emphasis added).

2. In January 1983, the EPA filed a federal court action against Westinghouse Electric Corporation under Sections 104, 106, and 107 of CERCLA, 42 U.S.C. 9604, 9606, and 9607, and provisions of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, seeking the cleanup of hazardous substances and wastes at two sites in Bloomington, Indiana. See *United States* v. *Westinghouse Elec. Corp.*, No. IP 83-9-C (S.D. Ind.).[3] As a result of remedial alternative assessments undertaken by the EPA, in accord with the NCP, and after intensive negotiations, the parties reached a settlement agreement in December 1984 providing for "comprehensive remedial measures to be undertaken at each site [at issue]." Pet. App. 7a. As explained by the court of appeals,

> [t]he agreement required the measures to be undertaken in two steps: first, a removal action involving surface excavation and capping of

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[3] In 1981, the City of Bloomington had filed a separate federal court action under CERCLA against Westinghouse, seeking the cleanup of two other sites. See *City of Bloomington* v. *Westinghouse Electric Corp.*, No. IP 81-448-C (S.D. Ind.). After the filing of the EPA's lawsuit, the district court consolidated the actions.

> abandoned dump sites; and second, the burning of hazardous wastes in a trash-fired incinerator.

Ibid.

The parties released the settlement agreement—embodied in a proposed consent decree—to the public on December 3, 1984. Beginning on December 5, "[t]he proposed consent decree was subjected to intensive public scrutiny, including 14 public meetings, media interviews and votes before various city, county and state governmental bodies." Pet. App. 7a.[4] After the parties approved and signed the consent decree, they lodged it with the district court on May 20, 1985, pending conclusion of the thirty-day public comment period prescribed by Department of Justice regulations. See 28 C.F.R. 50.7.[5]

During the public comment period, a number of concerned citizens—including David Schalk and Ronald Smith—submitted comments to the government opposing the proposed consent decree.[6] As summarized by the court of appeals, those comments

> suggested that the consent decree's proposed remedial measures were inadequate, that there was a lack of opportunity for meaningful public com-

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[4] As the court of appeals pointed out, "[n]one of those meetings was required by federal law." Pet. App. 7a.

[5] At the request of the Bloomington Common Council and area residents, the government extended the comment period for an additional two weeks—until July 8, 1985. Pet. App. 7a.

[6] In 1988, Schalk and Smith filed a federal court action challenging entry of the *Westinghouse* consent decree. The district court dismissed the action as premature under Section 113(h)(4) of CERCLA, 42 U.S.C. 9613(h)(4), and the court of appeals—after consolidating that case with petitioners' action—affirmed. Pet. App. 9a-10a. Schalk and Smith have not filed a separate petition for a writ of certiorari.

> ment and review, that other remedial alternatives were not considered, that incineration is not a safe method for disposing of [hazardous substances], and that no adequate written assessment of the potential environmental effects of the remedy had been prepared.

Pet. App. 7a-8a. In August 1985, the EPA responded to the public comments noting, among other things, that other methods of treatment and disposal of the hazardous substances had been considered and rejected as unsatisfactory, that more opportunity for public comments than legally required had already been provided, and that additional opportunities were planned in connection with the processing of specific permits required by the consent decree.[7] On August 22, 1985, the district court approved and entered the consent decree.

3. In February 1988, petitioners filed this federal court action against respondent, the Administrator of the EPA, raising a number of challenges to the adoption of the remedial plan contained in the *Westinghouse* consent decree.[8] In particular, petitioners alleged that respondent had violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.

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[7] In this case, for example, before the waste-disposal facilities the consent decree calls for can be constructed, federal and state laws, including RCRA and the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601 *et seq.*, require extensive permitting and approval processes subject to a period of public comment and—if appropriate—public hearings and appeals. See Pet. App. 14a n.5.

[8] Petitioners initially filed the action in the District of Columbia. In July 1988, the district court transferred the action—together with the similar lawsuit filed by Schalk and Smith, see note 6, *supra*—to the Southern District of Indiana. Pet. App. 9a.

4321 *et seq.*, by not preparing an environmental impact statement with regard to the remedial plan selected, by failing to study remedial alternatives, and by failing to provide meaningful public participation in the remedial selection process. See Compl. ¶¶ 54-61, 66-68. In addition, petitioners claimed that respondent had violated Section 105 of CERCLA, 42 U.S.C. 9605, by not preparing a remedial investigation and feasibility study (RI/FS) before selecting the remedial plan, and that each of respondent's unlawful actions violated the Administrative Procedure Act, 5 U.S.C. 553, 706. See Compl. ¶¶ 69-75. Petitioners sought declaratory and injunctive relief.

In September 1988, the government moved to dismiss petitioners' complaint, contending that Section 113(h)(4) of CERCLA, 42 U.S.C. 9613(h)(4), deprived the court of subject matter jurisdiction over petitioners' particular challenge to the proposed remedial action under Sections 104 and 106 of CERCLA, 42 U.S.C. 9604 and 9606. Pet. App. 21a-22a.

4. In December 1988, the district court granted the government's motion and dismissed petitioners' complaint for lack of jurisdiction under Section 113(h)(4) of CERCLA, 42 U.S.C. 9613(h)(4). Pet. App. 19a-31a. As an initial matter, the court held that, in light of the express provision in Section 113(h) of CERCLA, 42 U.S.C. 9613(h), neither the APA nor NEPA confers jurisdiction over petitioners' complaint since "[i]t is undisputed that the EPA action of which [petitioners] complain involves removal or remedial action pursuant to sections 104 and 106(a) of CERCLA, 42 U.S.C. §§ 9604, 9606(a)." Pet. App. 22a.

Turning to the government's contention that Section 113(h)(4) "precludes judicial review under the

citizen's suit provision until the remedial action selected by the EPA has been taken or secured," the court found that "the statute is not entirely clear about just when in the course of a remedial action a citizen's suit may be brought." Pet. App. 24a. The court therefore reviewed the legislative history, *id.* at 24a-30a, and determined that "the interpretations [there] precluding a citizen's suit challenging EPA action until at least the first phase of the remedy has been implemented are far more consistent with the official committee reports accompanying SARA," *id.* at 30a. The court thus concluded that Section 113(h) "permits citizens' suits challenging EPA actions only once a remedial action or discrete phase of a remedial action has been completed," Pet. App. 30a, and held that the statute "clearly provides that federal courts do not have subject matter jurisdiction for preenforcement reviews of EPA removal actions pursuant to section 9604," *ibid.* (quoting *Dickerson* v. *Administrator, EPA*, 834 F.2d 974, 977 (11th Cir. 1987)).

5. The court of appeals affirmed. Pet. App. 3a-17a. The court reviewed the pertinent language of Section 113(h)(4), concluding that "[t]he obvious meaning of this statute is that when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy." Pet. App. 11a (citing *Alabama* v. *EPA*, 871 F.2d 1548, 1557 (11th Cir. 1989)). And the court read the final sentence in Section 113(h)(4), *i.e.*, "[s]uch an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site," as further support for its "understanding of the statute's plain meaning." Pet. App. 11a. Here, the court pointed out, "[a]n incinerator has been chosen as the method to dispose of hazardous wastes in the Bloom-

ington area, but the remedial action outlined in the consent decree has not yet been undertaken." *Ibid.* In Section 113(h)(4), the court concluded, "Congress intended * * * to prevent unnecessary delay in implementing hazardous waste cleanups. That type of delay would surely result if [petitioners] were successful in requiring EPA to conduct Environmental Impact Statements and further Feasibility Studies." Pet. App. 11a-12a. Accordingly, the court held that Section 113(h)(4), by its terms, "precludes federal court review at this stage—when a remedial plan has been chosen, but not 'taken' or 'secured.'" Pet. App. 12a.[9]

ARGUMENT

1. Petitioners principally contend (Pet. 14-19) that Section 113(h)(4) does not preclude judicial review here because they "are in the posture of bringing a *post*-enforcement review claim, not a *pre*-enforcement review action." Pet. 14. The plain

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[9] Having concluded that "the plain language of the statute is clear," the court of appeals had no occasion to "engage in the lengthy examination of legislative history." Pet. App. 12a. The court observed, however, that "[t]he legislative history supports the conclusion that federal courts are deprived of subject matter jurisdiction where remedial action has not been completed." *Ibid.*

Petitioners also claimed that Section 113(h) should not be applied retroactively to their complaint, Pet. C.A. Br. 8-32, and that their complaint was not a challenge implicating Section 113(h), Pet. C.A. Br. 33-42. The court of appeals rejected those claims, Pet. App. 13a-16a, and petitioners have not sought further review of them. To the extent petitioners asserted that jurisdiction was available under the APA and that the dismissal for lack of jurisdiction amounted to a constitutional violation, the court of appeals rejected those claims as well. *Id.* at 16a-17a.

terms of the statute belie that contention, since the statute does not trigger judicial review based on "enforcement." To the contrary, the statute provides review only for "removal or remedial action *taken* under [Section 104] or *secured* under [Section 106]," Section 113(h)(4) of CERCLA, 42 U.S.C. 9613 (h)(4), not for actions "enforced" under those provisions. In other words, the statute provides review of challenges only to remedial actions already taken, not to planned remedial actions that have yet to be implemented. Indeed, the statute's use of the past tense—"[a]n action * * * alleging that the removal or remedial action taken * * * or secured * * * was in violation"—to identify reviewable challenges underscores this point, particularly when contrasted with the statute's use of the future tense to proscribe challenges to removal actions "where a remedial action is to be undertaken." *Ibid.*

In an effort to avoid the straightforward terms of the statute, petitioners now contend (Pet. 15-16) that Section 113(h) bars jurisdiction to review only challenges to administrative orders issued under Section 106(a) of CERCLA, 42 U.S.C. 9606(a), but not to court orders or consent decrees resulting from challenges brought under that statutory provision. That distinction is irrelevant here, since petitioners are challenging remedial action selected under Section 104 of CERCLA, 42 U.S.C. 9604—remedial action that falls within the express bar of Section 113(h), namely, "[n]o Federal court shall have jurisdiction * * * to review any challenges to * * * remedial action selected under section 9604." 42 U.S.C. 9613(h).

2. Contrary to petitioners' sweeping assertions (Pet. 19-22), the court of appeals' decision is fully consistent with other decisions construing the judicial

review provisions in Section 113(h). The courts of appeals have uniformly held that Section 113(h) precludes review of pre-implementation challenges to Section 104 and Section 106 actions.[10] See, *e.g.*, *Voluntary Purchasing Groups, Inc.* v. *Reilly*, 889 F.2d 1380, 1386-1390 (5th Cir. 1989); *Dickerson* v. *Administrator, EPA*, 834 F.2d 974, 977-978 (11th Cir. 1987); see also *Wagner Seed Co.* v. *Daggett*, 800 F.2d 310, 314-315 (2d Cir. 1986); *United States* v. *Outboard Marine Corp.*, 789 F.2d 497, 505-506 (7th Cir.), cert. denied, 479 U.S. 961 (1986); *Lone Pine Steering Comm.* v. *EPA*, 777 F.2d 882, 887-888 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986); but see *Cabot Corp.* v. *EPA*, 677 F. Supp. 823 (E.D. Pa. 1988) (suggesting in dicta that Section 113(h)(4) does not preclude review of an individual's pre-implementation challenge to a remedial plan).[11]

Petitioners' contention (Pet. 19-21) that the decision below conflicts with *Alabama* v. *EPA*, 871 F.2d 1548 (11th Cir.), cert. denied, 110 S. Ct. 538 (1989), is wide of the mark. In that case, the Eleventh Circuit held that Section 113(h)(4) barred judicial review of plaintiffs' challenge to the remedial plan arising under CERLCA. 871 F.2d at 1557-1559. Indeed, the court made plain that "because

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[10] To be sure, courts have spoken in terms of "pre-enforcement review." That terminology, however, reflects only the fact that most challenges to remedial actions have been brought by "potentially responsible parties" before the filing of enforcement actions against them. See, *e.g.*, *J.V. Peters & Co.* v. *EPA*, 767 F.2d 263 (6th Cir. 1985); *Lone Pine Steering Comm.* v. *Administrator, EPA*, 777 F.2d 882 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986).

[11] Petitioners, although citing the *Cabot* decision in passing (Pet. 28), correctly recognize that its statement in dicta does not give rise to a conflict warranting further review.

plaintiffs challenge the implementation of the remedial action plan selected, not the selection of an offsite remedial action plan in general," it "lack[ed] jurisdiction over this challenge to the implementation of the remedial plan under section 113(h)." 871 F.2d at 1558.[12] Here, as the court of appeals correctly recognized, see Pet. App. 15a-16a, petitioners have pursued a similar challenge. For that reason, the decision below is fully consistent with the *Alabama* case.[13]

3. Finally, petitioners contend (Pet. 29-34) that, despite the limitation of Section 113(h)(4), the courts below erred in failing to invoke *Leedom* v. *Kyne*, 358 U.S. 184 (1958), to exercise jurisdiction over their challenge to the remedial action. As this Court has made plain, the *Leedom* v. *Kyne* doctrine has "narrow limits," *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964), and may apply only where the agency—at a minimum—plainly acts "in excess of its delegated powers and contrary to a *specific prohibition in the Act.*" *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract*

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[12] To be sure, in *Alabama* v. *EPA*, the court of appeals briefly addressed and rejected plaintiffs' claims "[t]o the extent plaintiffs' complaint may in part be read as not challenging the remedial action plan and therefore not removed from federal jurisdiction by section 113(h)." 871 F.2d at 1559. But that alternative ground of decision does not conflict with the decision below, since the court of appeals here expressly determined that petitioners' complaint raised only such an impermissible challenge under CERCLA. See Pet. App. 15a-16a.

[13] Nor does the decision below conflict with *Browning-Ferris Indus.* v. *Muszynski*, 899 F.2d 151 (2d Cir. 1990). See Pet. 19, 21-22. There, the court of appeals "assume[d] jurisdiction *arguendo* without deciding the issue [whether Section 113(h) precluded judicial review]." 899 F.2d at 159.

Employees (*Railway Clerks*), 380 U.S. 650, 660 (1965); *Leedom* v. *Kyne*, 358 U.S. at 188.

Here, the court of appeals, after reviewing the process by which the government and other parties to the *Westinghouse* action developed and sought to implement the remedial plan, found no evidence that the government "failed to obey mandatory statutory requirements." Pet. 29. In other words, the record here does not suggest—let alone establish—that the EPA has acted "contrary to a *specific prohibition* [in the governing statutes]." *Railway Clerks*, 380 U.S. at 660. And invocation of jurisdiction under *Leedom* v. *Kyne* would be particularly inappropriate where, as here, judicial review is postponed—rather than foreclosed—by virtue of Section 113(h). Indeed, petitioners here will have ample opportunity to raise their challenges before the courts. The *Westinghouse* consent decree requires at least nine permits and approvals before the incinerator may be constructed; these proceedings call for public comment and will be subject to judicial review. See Pet. App. 14a n.5.[14]

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[14] For similar reasons, petitioners' efforts (Pet. 25-28) to elevate their statutory contentions to constitutional claims warrant no further review. See Pet. App. 17a; cf. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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